CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Lawrence Bittaker concerning the Department of Corrections' "Administrative Bulletin 87/12," entitled "Moratorium on Submission of Operational Procedures for Director's Approval"[1]	1991 OAL Determination No. 7 [Docket No. 90-009] November 22, 1991 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: MARZ GARCIA, Director

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Mathew Chan, Staff Counsel
Rulemaking and Regulatory
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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not an administrative bulletin of the Department of Corrections, which permits certain institutional plans of operation to be implemented and/or changed without prior approval by the Director of Corrections, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the challenged bulletin is a "regulation." The bulletin in substance attempts to amend duly-adopted provisions of the California Code of Regulations without first complying with legislatively-mandated public notice and comment requirements.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not "Administrative Bulletin 87/12" ("challenged bulletin") of the Department of Corrections ("Department"), which permits institutional plans of operation to be implemented and/or changed without prior approval of the Director of Corrections, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) the challenged bulletin is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) the challenged bulletin violates Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal (Second District, Division 3) described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
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> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to

whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, the state established additional institutions, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[11] The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"[12] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[13]

Authority [14]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations ("CCR"). This policy has changed dramatically in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[15] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[16] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[17]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the

California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 85 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.[18]

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.[19] The manuals were the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. Beginning in late 1987, the Department began the process of combining all six existing manuals into a single "California Department of Corrections Operations Manual" (referred to by the acronym "DOM). So far, Volumes I, II, III, V, VI, VII, and VIII of the new DOM have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. Until its deletion in October 1990, a preface to Chapter 1, Division 3, Title 15 of the CCR stated in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Courts have struck down portions of the second tier for failure to comply with APA requirements.[20] Prior to 1991, courts had invalidated the Classification Manual[21] and parts of the Administrative Manual[22] (and unincorporated "Administrative Bulletins").[23] In a September 1991 unpublished decision, the California Court of Appeal (Fifth Appellate District), ordered the Department to "cease enforcement of those portions of the Department of [sic] Operations Manual that require compliance with the [APA] pending proof of satisfactory compliance with the provisions of the Act."[24] Similarly, OAL regulatory determinations have found the Classification Manual,[25] several portions of the Administrative Manual,[26] and several portions of the

Case Records Manual[27] to violate Government Code section 11347.5.[28]

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.[29] These plans often repeat parts of statutes, Director's Rules (i.e., codified regulations), and procedural manuals.[30]

Background: This Request for Determination

This Request for Determination was submitted by Lawrence Bittaker, an inmate at San Quentin, who alleges that the Department has adopted a policy which circumvents sections 3095, 3131, 3171, and 3234 of Title 15 of the CCR and violates Penal Code section 5058 and the APA. The cited regulation sections require the Director of the Department to approve the implementation of or changes to certain plans of operation.

Section 3095 of Title 15 provides:

> "Wardens and superintendents will submit a plan of operations for inmate canteens and special canteen purchases to the director for annual review and approval. Changes will not be made in an approved plan without prior approval of the director." [Emphasis added.]

Section 3131 of Title 15 provides in part:

> "Each warden, superintendent and heads [sic] of correctional facilities shall prepare and maintain a plan of operations for the sending and receiving of mail for all inmates housed in the facility. This plan will require the director's approval before implementation and before any revision is made to an approved plan. . . ." [Emphasis added.]

Section 3171 of Title 15 provides in part:

> "(a) Wardens, superintendents and regional administrators will prepare and maintain a plan of operations for inmate visiting at their respective institutions and facilities where inmates and parolees reside. The director's approval is required before implementation and before any revision is made to an approved plan. . . ." [Emphasis added.]

Section 3234 of Title 15 provides in part:

> "Each warden, superintendent and regional parole administrator will establish a plan of operations for the formation and conduct of all leisure time activity groups within the facility where inmates and parolees are confined. . . . The overall plan for activity groups will be submitted to the director for review and approval before implementation and before any change is made in an approved plan." [Emphasis added.]

The challenged bulletin ("Administrative Bulletin 87/12," dated February 10, 1987) permits implementation of or changes to the above-mentioned operational plans ". . . without prior approval of the director." (Emphasis added to quotation from Title 15, CCR, section 3095.) The subject of that Bulletin is "Moratorium on Submission of Operational Procedures for Director's Approval." The Bulletin states in part:

> "With the exception of Disturbance Control Plans, the operational procedures listed in Administrative Manual Sections 1006 and 4006 shall not be forwarded for the Director's approval.
>
> "This moratorium is in conjunction with the departmental Manuals and Procedures Study Report recommendation to standardize procedures at the departmental level.
>
> "Each deputy/assistant director shall determine the status of local operational procedures which are currently being reviewed by their [sic] staff and decide whether the review shall be completed or the procedures shall be returned without further action.
>
> "In the future, if a deputy or assistant director determines that a local operational procedure needs to be amended and submitted for Director's approval because of significant policy or legislative changes, the institutions/parole regions shall be instructed in writing of such directions only through the Director's office.
>
> "Each warden/superintendent/regional administrator shall ensure that local procedures reflect accurate policy and remain current. . . ." [Emphasis added.]

Section 4006 of the Administrative Manual lists "Operational Plans and Procedures Which Require Director's Approval." Among those listed are operational plans for "Inmate Canteens," "Inmate Mail," "Inmate Visiting," and "Inmate Activity Groups" (the same category of plans covered under sections 3095, 3131, 3171 and 3234 of Title 15 of the CCR, quoted above).[31]

Inmate Bittaker invoked the Department of Corrections' administrative grievance procedure in August 1988, alleging that (among other things) San Quentin mail handling rules were invalid because they had been changed without first having been approved by the Director of Corrections pursuant to Title 15, CCR, section 3131 (Director's Rule 3131). This portion of the grievance was rejected by San Quentin authorities in August 1988 on the grounds that ". . . A[dministrative] B[ulletin] 87/12 supersedes the Directors [sic] Rule. . . ." [Emphasis added.]

On November 2, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[32] along with a notice inviting public comment. No public comments were received. On December 17, 1990, the Department submitted its response to this request ("Response").

II. ISSUES

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED BULLETIN CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED BULLETIN FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

> "As used in this title [Title 2. 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." [Emphasis added.]

Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The Department of Corrections is clearly a "state agency" as that term is defined in Government Code section 11000. Further, Government Code section 11342, subdivision (b), provides that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."[33] Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.[34]

In addition, Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

Supplementing the pertinent Government Code provisions, Penal Code section 5058, subdivision (a) specifically requires that "rules . . . for the administration of the prisons. . . . shall be [adopted pursuant to the APA]."

SECOND, WE INQUIRE WHETHER THE CHALLENGED BULLETIN CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['] regulation ['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,[35] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][36]

A. Part One - Does the Challenged Bulletin Establish A Rule or Standard of General Application or a Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes."

In its Response, the Department argues that the challenged bulletin is "non-regulatory" to the extent that it does not represent a rule of general application. We disagree.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[37] It has been judicially held that "rules significantly affecting the male prison population" are of general application.[38]

Although the challenged bulletin does not directly regulate inmates, implementation of the bulletin will impact on operational procedures for the prison facility. (See discussion on page 222 pertaining to the internal management exception.) Consequently, the challenged bulletin significantly affects the prison population.

B. Part Two - Does the Challenged Bulletin Establish A Rule Which Interprets, Implements, or Makes Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

The Department also contends that the bulletin does not interpret, implement or make specific the law since it merely provides information and repeats existing law. In making its argument, the Department quotes Penal Code sections 5052 and 5055. For reasons we will discuss, neither of those sections supports the Department's position.

Section 5052 states:

> "The Director of Corrections and any other officer or employee of the Department of Corrections designated in writing by the director, shall have the power of a head of a department pursuant to Article 2 (commencing at Section 11180) of Chapter 2, Part 1, Division 3, Title 2, of the Government Code." [Emphasis added.]

Article 2 of Chapter 2, Part 1, Division 3, Title 2 of the Government Code grants to the head of each department the authority to "make investigations and prosecute actions." That article does not pertain to approval of operational plans. Accordingly, Penal Code section 5052 has no relevance to this determination proceeding.

Section 5055 states:

> "All powers and duties granted to and imposed upon the Department of Corrections shall be exercised by the Director of Corrections, ...
>
> "Whenever a power is granted to the Director of Corrections or a duty is imposed upon the director, the power may be exercised or the duty performed by a deputy of the director or by a person authorized pursuant to law by the director." [Emphasis added.]

Section 5055 appears to authorize a deputy director or other lawfully designated person to approve institutional plans of operation on behalf of the Director. Section 5055 does not, however, negate the Director's legal duty to approve such plans; nor does it even outline the circumstances under which the Director's duty to approve operational plans will be delegated.

The bulletin states that except for "Disturbance Control Plans," all operational procedures listed in Administrative Manual sections 1006 and 4006 shall not be forwarded for the Director's approval. Note that the bulletin does not

specify that the operational plans will instead be submitted to a deputy director or a duly delegated person for approval.

The bulletin contains two provisions addressing headquarters' (i.e., Director's) review of operational plans. The first provision addresses operational procedures which are "currently being reviewed" at headquarters; concerning such pending matters, each deputy/assistant director is to decide either (1) to complete the review or (2) to return the document to the individual institution "without further action."

The second provision concerning headquarters' review of operational plans provides instructions for the future, i.e., how to deal with operational procedure changes that had not to date been forwarded to headquarters by individual institutions and thus were not at that point in time awaiting approval/disapproval by the Director. The bulletin states:

> "In the future, if a deputy or assistant director determines that a local operational procedure needs to be amended and submitted for the Director's approval because of significant policy or legislative changes, the institutions/parole regions shall be instructed in writing of such directions only through the Director's office." [Emphasis added.]

It seems clear from the challenged bulletin, especially read in light of the requester's statement concerning changes to San Quentin mail handling rules, that individual institutions were henceforth free to modify specified types of operational plans without first having to obtain approval from the Director. Clearly, the challenged bulletin does not merely repeat Penal Code section 5055.[39]

Sections 3095, 3131, 3171 and 3234 of Title 15 of the CCR require approval by the Director of Corrections prior to implementation of and/or changes to specific institutional plans that pertain to the operation of inmate canteens, mail, visitation and activity groups. To the extent that the challenged bulletin prescribes when the Director's approval for such plans may be omitted, it interprets, implements and makes specific existing law.[40]

WE THUS CONCLUDE THAT THE CHALLENGED BULLETIN IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED BULLETIN FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[41] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[42]

The Department contends that the challenged rules fall within the internal management exception. That argument lacks merit.

According to Government Code section 11342, subdivision (b), every general rule (i.e., every "standard of general application") adopted by any agency either (1) to implement, interpret, or make specific the laws enforced by it or (2) to govern its procedure is a "regulation" which must be adopted pursuant to the APA, "except one which relates only to the internal management of the state agency." (Emphasis added.) Grier v. Kizer, which provides a good summary of case law on internal management, states that this exception is "narrow."[43]

After quoting Government Code section 11342, subdivision (b), the Grier Court states:

> "Armistead v. State Personnel Board, supra, 22 Cal.3d at pages 200-201, 149 Cal.Rptr. 1, 583 P.2d 744, determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the . . . statutes. . . ." [Fn. omitted.]' (Id., at pp. 203-209, 149 Cal.Rptr. 1, 583 P.2d 744, [emphasis added by Grier Court]."
>
> "Armistead cited Poschman v. Dumke (1973) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, which similarly rejected a contention that a regulation related only to internal management. The Poschman court held: '"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community'."' (Armistead, supra, 22 Cal.3d at p. 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.) [44]"

> "Relying on Armistead, and consistent therewith, Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, held a Department of Corrections'' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population" in its custody.'
>
> "By way of example, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by Armistead's holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception."

In the matter before us, the Department has elected to codify in the CCR a series of provisions requiring that the Director of Corrections approve operational plans (and any changes to such plans) concerning inmate canteens, mail handling, visiting, and leisure time activities. These CCR provisions have the force and effect of law.[45] It is a fundamental principle of administrative law that the agency promulgating regulations is bound by its own regulations.[46]

Also, according to well-settled case law, provisions significantly affecting inmates cannot be deemed to fall within the internal management exception.[47] Operational plan provisions concerning inmate canteens, leisure time activities, mail handling and visiting obviously have a direct impact on inmates. For example, inmates have a very real interest in visiting rules.

In its Agency Response, the Department argues that the challenged bulletin should be deemed exempt from APA requirements because it "in no way" affects the public. We cannot accept this argument for two reasons. First, as noted above, under governing case law, inmates constitute one of the "publics" affected by Corrections regulations. Second, groups other than inmates would also be directly affected by the informal amendment of Title 15, CCR, sections 3095, 3131, 3171, 3234.

According to the challenged bulletin, operational plans concerning mail handling and visitation procedures--two topics of great interest to segments of the public--will not routinely require the Director's approval. Inmates' relatives, friends, and legal representatives typically have great interest in visiting and mail handling policies. Rules concerning mail handling and visitation would appear

to involve a matter of serious consequence involving an important public interest.

In addition, prisoners may correspond with a wide variety of entities, including magazine publishers and other vendors. Insofar as these policies are subject to formal review by the Director, interested parties (inmates, relatives, lawyers, etc.) would have the opportunity to raise concerns about proposed policy changes to the Director.

The general public might also be affected by the challenged bulletin in two particular ways. First, not amending the CCR provisions in question to reflect the actual rules used in processing operational plans results in readers of the CCR being given a substantially inaccurate picture of how this aspect of Departmental procedure is governed. The challenged bulletin does not merely add minor procedural details to the CCR provisions in question, it in substance repeals them.[48] Second, citizens with an interest in how the Department is administered might wish to submit comments on the change to Departmental procedures reflected in the bulletin. Interested parties might take different positions on the advisability of amending the CCR to largely eliminate Director's review of operational plans. Some commenters might argue that elimination of the prior approval requirement was an effective means of decreasing bureaucratic paper-shuffling and focusing available resources on more higher priority issues. On the other hand, different observers might contend that the benefits of consistent, statewide rules outweighed the costs of central review and approval; that, for instance, legal review of new mail handling rules proposed for one particular institution prior to implementation could reduce litigation exposure.

The Department elected to retain central review of disturbance control plans, a matter evidently deemed to be of some sensitivity. Persons outside the Department, including not only inmate relatives, but also local government entities (especially district attorneys, local police agencies, superior courts, and public defender offices) might have had a different perspective concerning which matters merited central review.

For the reasons stated, we conclude that the challenged bulletin does not fall within the internal management exception. Our review also discloses that no other exceptions would apply to the challenged bulletin. HAVING FOUND THE DEPARTMENT'S BULLETIN TO BE A "REGULATION" AND NOT EXEMPT FROM THE REQUIREMENTS OF THE APA, WE CONCLUDE THAT THE BULLETIN VIOLATES GOVERNMENT CODE SECTION 11347.5, SUBDIVISION (A).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;

(2) "Administrative Bulletin 87/12" is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) no exceptions to the APA requirements apply;

(4) the Department's bulletin violates Government Code section 11347.5, subdivision (a).

DATE: November 22, 1991

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1. This Request for Determination was filed by Lawrence Bittaker, who, at the time of the filing of the request, was an inmate at San Quentin, California. The Department of Corrections was represented by Sara Bruce, Chief, Regulation and Policy Management, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "210" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Cases discovered since third survey

Case No. 1--Conroy v. Wolff (1950) 34 Cal.2d 745 (commission cannot decline to award credit for meritorious service in civil service examination in the absence of validly adopted rule or regulation).

Summary: Under the charter of the City and County of San Francisco, city commissions are empowered to adopt supplementary rules, but under the charter these rules (1) must be published, (2) one week's notice must be given, and (3) no change in the rules can affect a case pending before the commission. Also, according to the San Francisco Municipal Code, commission rules of "general public concern" must be posted in a conspicuous place or made available for public inspection. Petitioner Conroy, a San Francisco Police lieutenant, participated in a promotional examination for captain. Originally scheduled for November 6, 1946, the examination was postponed until December 12, 1946. On December 5, Lieutenant Conroy was awarded a "meritorious award" for services performed in connection with an arrest occurring November 16, 1946. Award of examination credit for meritorious service was mandatory under the city charter. The city Civil Service Commission declined to award Conroy the mandatory credits, however, on the grounds that the originally scheduled exam date of November 6 had been designated as the official cut-off date for computation of both seniority and meritorious award credits. This decision placed Conroy 15th on the list of eligibles; he would have been 8th if granted the credits. The Commission had duly adopted a cut-off date rule applying to seniority credits; it argued that the same rule was intended to apply to meritorious service credits.

The California Supreme Court unanimously ruled for Conroy. The Court held that while the Commission may well have had the power to adopt a cut-off date rule applying to meritorious service credits, that since the Commission had not complied with the legal requirements pertaining to adoption of rules, there was no validly adopted rule. The Court concluded: "[i]n the absence of a valid rule or regulation prescribing a different date the reasonable implication to be drawn from provisions of the charter is that the cutting off for the application of meritorious service credits should be not earlier than the date the examination is scheduled." (34 Cal. 2d at 748.)

The basis for the Court's conclusion that one of the municipal rulemaking requirements applied to the Commission was that awarding of credits for meritorious service appeared to be a matter "of general public concern." Cf. Poschman v. Dumke (1973) 31 Cal.App.2d 932, 944, 107 Cal.Rptr. 596, 603 (rule concerning awarding of tenure to

state college professor was not within California APA internal management exception because "tenure within any school system is a matter of serious consequence involving an important public interest." [Emphasis added.]

Case No. 2--Wallace v. State Personnel Board (1959) 168 Cal.App.3d 543 (Board cannot use uncodified provision in Personnel Transactions Manual to restrict clear and unambiguous provisions of statute and duly adopted regulation).

Summary: California Government Code section 18100 provides for sick leave credits for all state civil service personnel upon submission of satisfactory proof of the necessity thereof. Implementing this statute, the State Personnel Board duly adopted Title 2, California Administrative Code, section 401, defining sick leave as ". . . the absence from duty of an employee because of his illness or injury, his exposure to a contagious disease, his attendance upon a member of his immediate family who is seriously ill and requires the care or attendance of the employee, ..." [Emphasis added.] Wallace, a state employee, was fired based upon section 502 of the Personnel Transactions Manual (the same uncodified Manual at issue 19 years later in the case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1). Section 502 (the Manual provision invoked against Wallace) provided that an employee seeking sick leave must be physically incapacitated if his request for absence is based upon an emotional disturbance. Following Conroy v. Wolff (case no. 1, above), the Court rejected the Board's argument that the Manual provision was entitled to great weight as an administrative interpretation, noting that such an interpretation would not be followed if it (1) altered or enlarged the terms of a statute or (2) was erroneous. The Wallace Court stated:

> "It is well established that an administrative directive such as is embodied in section 502 does not have the force of law and hence may not be asserted as a standard for the conduct of the agency if the assertion would in any way effect a change in the meaning of section 401 of the Administrative Code. (Conroy v. Wolff . . . .) If, as was held in Nelson v. Dean . . . , [section 18100 of the Government Code] does not limit sick leave to physical illness [Nelson upheld as consistent with the statute the awarding of sick leave to an employee caring for an ill relative], then it follows that the administrative directive embodied in section 502 of the Transactions Manual cannot be used to so restrict the purpose and intent expressed in section 401 of the Administrative Code or 18100 of the Government Code. If the provisions of the Transactions Manual may not be so used, then it also follows that the provisions of section 401 of the

> Administrative Code, which are clear and unambiguous, must be given their obvious meaning that illness may be mental as well as physical."

Cf. 1990 OAL Determination No. 16 (Department of Personnel Administration policy requiring state employees using sick leave to reveal the specific nature of their illness found to violate Government Code section 11347.5). 1990 OAL Determination No. 16 (Department of Personnel Administration, Dec. 18, 1990, Docket No. 89-023), CRNR 91, No.1-Z, p. 40.) As in Conroy, the rule challenged in 1990 OAL Determination No. 16 was found invalid because it had not been duly adopted in accordance with applicable legal requirements.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional

Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.50 ($4.50 if mailed).

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline,

criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an

adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

11. Penal Code section 5000.

12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

13. Penal Code section 5054.

14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine

whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

16. Id.

17. For instance, Government Code section 11346.7, subdivision (b), requires a "final statement of reasons" for each regulatory action.

18. Section 3 of Statutes of 1975, chapter 1160, at page 2876, states:

> "It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]

19. Manuals were intended to supplement CCR provisions. The former Preface to Chapter 1, titled "Rules and Regulations

of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]
>
> [This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5. This preface was deleted in October 1990, after 14 years on the books.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's

Rules or the rules and regulations of another governmental agency." [Emphasis added.]

20. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement.

Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

21. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Hershipps & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)

22. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

23. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

24. Tooma v. Rowland (F015383) (Sept. 9, 1991).

25. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

26. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California

Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

27. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

28. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).

29. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations

> and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

> "Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.
>
> "(a) Each institution . . . shall establish local procedures for all major program operations.
>
> ". . . .
>
> "(b) Procedures shall be consistent with laws, rules, and departmental administrative policy . . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

30. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

31. Subsection (b) of Administrative Manual section 4006 states:

> "The deputy directors/assistant directors are delegated the authority and responsibility to approve, on behalf of the director, plans which pertain to their respective areas of administrative responsibility."

According to section 4006, the deputy director-administration has authority to approve inmate canteen plans while the deputy director-institutions has the authority to approve plans concerning inmate mail, visitation, and activity groups.

32. California Regulatory Notice Register 90, No. 44-Z, November 2, 1990, pp. 1623-1624.

33. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

    1989 OAL Determination No. 4 was upheld in May 1991 in a decision of the San Francisco Superior Court, which is currently being appealed by the losing side. State Water Resources Control Board v. Office of Administrative Law, SCN 906452, AO 54599 Div. Copies of the 30-page trial court statement of decision are available from OAL (phone Melvin Fong at (916) 324-7952) for a charge of $7.00 (postage included).

34. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

35. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

36. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

37. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

38. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

39. See note 31. We point out that the Administrative Manual section is not published in the CCR. Any reflection of that section, therefore, does not constitute a restatement of existing law.

40. Penal Code section 5058 authorizes the Director of Corrections to adopt regulations for the administration of prisons. Under that authority, the Director chose to adopt regulation sections 3095, 3131, 3171 and 3234 of Title 15 of the CCR which require the Director to approve of certain institutional plans of operation. Any amendment or alteration of that duty, therefore, must also be accomplished by regulation.

41. Government Code section 11346.

42. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

    c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

    d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

    e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

    f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr.

546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like Grier v. Kizer, 1990 OAL Determination No. 6 rejected the idea that City of San Joaquin (cited above) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from 42.the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $162.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

43. It has been argued that Americana Termite Co. v. Structural Pest Control Board (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693, supports the proposition that an agency's policy decisions fall within the "internal management" exception. As we discussed at some length in 1990 OAL Determination No. 18 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88), the dictum in Americana Termite is misleading and should not be relied upon.

44. Armistead disapproved Poschman on other grounds. (Armistead, supra, 22 Cal.3d at p. 204, fn. 2, 149 Cal.Rptr 1, 583 P.2d 744.)

45. Zumwalt v. Trustees of California State Colleges (1973) 33 Cal.App.3d 666, 676, 109 Cal.Rptr. 344, 350 (regulations duly adopted and codified by an administrative agency pursuant to a statutory delegation of authority have the force of law). Accord: Agricultural Labor Relations Board v. Superior Court, Tulare County (1976) 16 Cal.3d 392, 402, 128 Cal.Rptr. 183, 189 (duly adopted ALRB regulation); Associated Beverage v. Board of Equalization (1990) 224 Cal.App.3d 192, 202, 273 Cal.Rptr. 639, 644 (duly adopted Board of Equalization regulation); In re Davis (1978) 87 Cal.App.3d 919, 925-26, 151 Cal.Rptr. 29, 32 (duly adopted California Youth Authority regulation).

In support of the principle that duly adopted regulations have the force and effect of law, the Davis Court cited

Government Code section 11374 (now 11342.2). Section 11342.2 provides:

> "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." [Emphasis added.]

Cf. Government Code section 11344.6 (courts must take judicial notice of regulations printed in California Code of Regulations).

46. U.S. v. Coleman (9th Cir. 1973) 478 F.2d 1371, 1374 ("agency is to be held to the terms of its regulations"); Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74 (board of supervisors is bound by terms of zoning ordinance until the ordinance is amended through proper legislative procedure). Cf. Wallace v. State Personnel Board (cited and discussed above in note 2) (Board was required to follow clear and unambiguous provisions of duly adopted regulation; uncodified rule which changed the meaning of the duly adopted CAC provision was unenforceable).

47. There is also the question of how to read the internal management exception together with Penal Code section 5058, subdivision (a). In Penal Code section 5058, the Legislature (1) authorizes the Department to prescribe rules and regulations "for the administration of the prisons" and (2) specifically mandates that such rules be adopted pursuant to the APA. Does Penal Code section 5058 have the effect of narrowing the scope of the internal management exception when that exception is applied to Department of Corrections enactments? Clearly, the provisions of the challenged bulletin relate to "the administration of prisons." [Emphasis added.] In fact, review by the departmental headquarters office in Sacramento of procedures adopted by individual wardens and superintendents would seem to be a key way in which central control is exercised over the administration of individual institutions.

48. Regulations which are no longer needed may be--and should be--repealed by the adopting agency pursuant to the APA. If the adopting agency can present facts demonstrating that the repeal or amendment in question is necessary for the immediate preservation of the public peace, health and safety, or general welfare, it can seek emergency repeal of the unneeded provisions. Emergency regulations must be reviewed by OAL within 10 days of submission; they typically take effect immediately upon approval by OAL.